

Agenda

Item #7



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commission Members and Counsel

From: Paul Lavin

Date: July 21, 2008

Re: Revised Draft Guidance on Reporting Requirements for a Ballot Question Committee

At its last meeting in June, the Commission considered the staff's proposed "Guidance on Reporting Requirements for a Ballot Question Committee." After hearing public testimony, the Commission Chair requested that Phyllis Gardiner, Commission Counsel, review the draft guidance and make revisions to ensure that it was clear regarding what expenditures on communications and activities would be reportable under 21-A M.R.S.A. § 1056-B. Ms. Gardiner and I drafted the attached revised guidance taking into consideration recent case law on the regulation of campaign speech, comments by the Commission members, and public testimony presented in June.

At the June meeting, Daniel Billings, Esq., who is legal counsel for the Maine Heritage Policy Center, and Zachary Heiden, Esq., legal director of the Maine Civil Liberties Union, urged the Commission to create a bright line test for determining what expenditures would be covered under § 1056-B and advocated that the Commission adopt the "express advocacy" standard. Under that standard, a communication or activity would have to clearly urge voters to vote for or against a ballot question (*e.g.*, "Support a ban on clear-cutting" or "Vote no on Question 1"). That standard would certainly provide a bright line but may fail to capture a great deal of political communications that are made for the purpose of opposing or promoting a ballot question.

At the June meeting, Ms. Gardiner stated that the Commission was not required to adopt an “express advocacy” standard, but could create a bright line test that was helpful for potential filers and would capture communications and activities that have the purpose of promoting or opposing a ballot question. Under the test contained in the revised draft, an expenditure would be covered under § 1056-B if it was made for a communication or activity that:

- ♦ expressly advocates for or against a ballot question, or
- ♦ clearly identifies a ballot question by apparent and unambiguous reference and is susceptible of no reasonable interpretation other than to promote or oppose the ballot question.

The revised guidance also attempts to clarify when expenditures on research and analysis would be covered under § 1506-B. Thank you for your consideration of this proposed guidance.



Proposed revisions are highlighted.

www.maine.gov/ethics
287-4179
287-6775

Guidance on Reporting as a Ballot Question Committee (effective June 30, 2008)

What is a ballot question committee?

Most organizations that raise or spend money to influence a statewide ballot question in Maine form a political action committee (PAC) for that purpose, and file regular PAC reports with the Commission. Some advocacy, charitable, or other organizations do not qualify as PACs under the Election Law, but they are interested in raising and spending money to influence a ballot question. In 2000, the Maine Legislature enacted 21-A M.R.S.A. § 1056-B to create a reporting requirement for these non-PAC organizations. Effective June 30, 2008, the Election Law designates these organizations as “ballot question committees” and they will be required to register with the Commission. Under the new requirements,

[a]ny person not defined as a political action committee who solicits and receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a ballot question must file a report with the Commission.

The complete language of 21-A M.R.S.A. § 1056-B is attached to this memo.

Does the requirement apply only to individuals?

No. Under Maine Election law, the term “person” includes individuals, committees, firms, partnerships, corporations, associations, or organizations.

When do ballot question committees have to register with the Commission?

Within seven days of receiving contributions or making expenditures to influence an election that exceed \$5,000, a ballot question committee must register with the Commission.

How do ballot question committees register with the Commission and file financial reports?

The committee must register and file campaign finance reports using paper forms (available on the Commission’s website). At this time, ballot question committees cannot file campaign finance reports electronically.

What contributions must be reported by ballot question committees?

Section 1056-B covers “contributions [received] for the purpose of initiating, promoting, defeating or influencing in any way a ballot question” This includes:

- funds that the contributor specified were given in connection with a ballot question;
- funds provided in response to a solicitation that would lead the contributor to believe that the funds would be used specifically for the purpose of initiating, promoting, defeating or influencing in any way a ballot question;
- funds that can reasonably be determined to have been provided by the contributor for the purpose of initiating, promoting, defeating or influencing in any way a ballot question when viewed in the context of the contribution and the recipient’s activities regarding a ballot question; and
- funds or transfers from the general treasury of an organization filing a ballot question report.

Funds provided in response to a solicitation that would lead the contributor to believe that the funds would be used to support an organization’s general activities, rather than activities relating to a ballot question, do not need to be reported.

A ballot question committee must report but is not required to itemize contributions from a single source that aggregate \$100 or less in any election.

What expenditures must be reported by a ballot question committee?

Section 1056-B covers expenditures for communications and activities made “for the purpose of initiating, promoting, defeating or influencing in any way a ballot question.” The Commission interprets this to include communications and activities which expressly advocate for or against a ballot question or which clearly identify a ballot question by apparent and unambiguous reference and are susceptible of no reasonable interpretation other than to promote or oppose the ballot question. Expenditures to be reported include:

- expenditures for communications to voters for the purpose of promoting or opposing a ballot question, including advertising on television, radio, and print media; literature that is mailed or distributed by hand to voters; automated telephone calls and scripted calls from live callers; signs, bumper stickers, and other forms of outdoor advertising;
- staff time promoting or opposing the ballot question at public or press events;
- staff time canvassing (conducting door-to-door visits to) voters;

- travel expenses paid to employees or volunteers who are conducting activities to promote or oppose a ballot question;
- staff time preparing presentations, testimony, letters to the editor, opinion pieces, articles for publication, or press releases to promote or oppose a ballot question;
- research or analysis, including written reports and legal opinions, where the organization knows or reasonably should know that the results will be used to promote or oppose a ballot question and where the results are used for that purpose; and
- expenditures to distribute research or technical analysis regarding a ballot question for the purpose of encouraging voters to vote yes, or no, on the question.

This list is not intended to be exhaustive and is similar to the types of expenditures reported by political action committees to promote or defeat a ballot question.

What expenditures are not covered by § 1056-B?

The Commission interprets § 1056-B as excluding expenditures for communications or activities that do not clearly identify a ballot question by apparent and unambiguous reference. In addition, expenditures made merely to educate voters or others about a ballot question in a neutral way are not covered by § 1056-B, even if a ballot question is clearly identified. These would include expenditures for:

- hosting a meeting at which advocates or members of the public are invited to present their views on the ballot question, provided that the sponsors of the event make reasonable efforts to ensure that the forum is balanced;
- distributing news stories, commentary, or editorials concerning a ballot question through the facilities of a broadcasting station, newspaper, magazine, or other periodical publication, unless the facilities are owned or controlled by persons otherwise engaged in other advocacy activities to promote or oppose the ballot question; and
- research or analysis concerning a ballot question paid by an entity which is not otherwise participating in the ballot question campaign, provided that the research or analysis does not clearly express support for or opposition to the ballot question or urge others to vote for or against the ballot question.

Ballot question committees must report but are not required to itemize expenditures to a single payee that total \$100 or less in an election.

Do “expenditures [made] ... for the purpose of initiating ... a ballot question” include payments to staff or other expenses incurred in drafting legislation intended as a direct initiative?

Yes. If an organization pays its employees (or incurs other expenses) to draft legislation that the organization intends will be submitted to the Secretary of State as a direct initiative (even if submitted by a different organization or individuals), those expenses should be counted as expenditures made to initiate a ballot question.

What about expenditures to circulate ballot question petitions to collect signatures, and other expenses of advocates for and against a ballot question during the signature-gathering phase?

In 2006, the Legislature amended the term “expenditure” to clarify that payments of money to collect signatures for a ballot question must be reported. The Commission interprets the “expenditures [made] ... for the purpose of ... defeating or influencing in any way” includes payments made by opponents of the ballot question during the time period in which proponents may gather petition signatures.

What if an organization raises money to give to a PAC?

If an organization solicits and receives contributions for the purpose of influencing a ballot question and gives those funds to a PAC, the contributions received by the organization count towards the \$5,000 threshold. For example, if a trade association solicits funds from its members in order to make a contribution to a PAC involved in a ballot question, the trade association may have to register as a ballot question committee if it raised more than \$5,000. It is not the contribution to the PAC that triggers the registration requirement; it is the fund-raising activity by the trade association that triggers it.

What if an organization contributes or transfers funds to another organization which is not a PAC?

A contribution or transfer of funds from one organization to another organization for the purpose of influencing a ballot question counts towards the \$5,000 threshold as an expenditure made by the first organization.

What if an organization donates the time of its paid employees to a PAC to influence a ballot question or makes payments to vendors for goods or services to influence a ballot question in coordination with a PAC?

Donating paid staff to a PAC, or coordinating expenditures with a PAC are in-kind contributions to the PAC. They do not count toward the \$5,000 expenditure threshold that would trigger filing of a § 1056-B report by the donor; however, the PAC must report them as in-kind contributions.

An organization's expenditures to influence a ballot question may be considered an in-kind contribution to a PAC only if they are coordinated with the PAC or are accepted by a PAC. Expenditures to influence a ballot question made independently of the PAC should not be considered contributions to the PAC and would count toward the \$5,000 threshold.

Guidance to PACs and Contributors on the Reporting of In-Kind Contributions

In 2006, some PACs involved in ballot question campaigns reported receiving significant in-kind contributions from other organizations, but provided little detail regarding the goods and services they received. In future elections, the Commission will request that PACs provide more detail about large in-kind contributions they have received. For example, if a PAC reports that it received significant paid staff time from another organization, it should include a description of those staff activities and the number of hours of staff time that were contributed. A PAC's reporting of coordinated spending made by a contributor should include a brief description of the goods and services that were purchased and their value. Contributed staff and coordinated expenditures should not be lumped together as a single contribution for the reporting period, but should be itemized as separate contributions.

Other Guidance

If you have any questions, please telephone the Commission's PAC/Party/Lobbyist Registrar, Jeremy Brown, at 287-4179.

21-A M.R.S.A. § 1056-B. Ballot Question Committees

Any person not defined as a political action committee who solicits and receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a ballot question must file a report with the commission. In the case of a municipal election, a copy of the same information must be filed with the clerk of that municipality. Within 7 days of receiving contributions or making expenditures that exceed \$5,000, the person shall register with the commission as a ballot question committee. For the purposes of this section, expenditures include paid staff time spent for the purpose of influencing in any way a ballot question. The commission must prescribe forms for the registration, and the forms must include specification of a treasurer for the committee, any other principal officers and all individuals who are the primary fund-raisers and decision makers for the committee.

1. Filing requirements. A report required by this section must be filed with the commission according to a reporting schedule that the commission shall establish that takes into consideration existing campaign finance reporting schedule requirements in section 1059.

2. Content. A report must contain an itemized account of each expenditure made to and contribution received from a single source aggregating in excess of \$100 in any election; the date of each contribution; the date and purpose of each expenditure; and the name and address of each contributor, payee or creditor. The filer is required to report only those contributions made to the filer for the purpose of initiating, promoting, defeating or influencing in any way a ballot question and only those expenditures made for those purposes. The definitions of "contribution" and "expenditure" in section 1052, subsections 3 and 4, respectively, apply to persons required to file ballot question reports.

2-A. Contributions. For the purposes of this section, "contribution" includes, but is not limited to:

- A. Funds that the contributor specified were given in connection with a ballot question;
- B. Funds provided in response to a solicitation that would lead the contributor to believe that the funds would be used specifically for the purpose of initiating, promoting, defeating or influencing in any way a ballot question;
- C. Funds that can reasonably be determined to have been provided by the contributor for the purpose of initiating, promoting, defeating or influencing in any way a ballot question when viewed in the context of the contribution and the recipient's activities regarding a ballot question; and

D. Funds or transfers from the general treasury of an organization filing a ballot question report.

3. Forms. A report required by this section must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form.

4. Records. A person filing a report required by this section shall keep records as required by this subsection for one year following the election to which the records pertain.

A. The filer shall keep a detailed account of all contributions made to the filer for the purpose of initiating, promoting, defeating or influencing in any way a ballot question and all expenditures made for those purposes.

B. The filer shall retain a vendor invoice or receipt stating the particular goods or services purchased for every expenditure in excess of \$50.